response from either the complainant or the cable operator, as appropriate. Within 30 days from the complaint being submitted, the Commission should make an initial ruling as to whether the contested rates exceed the relevant benchmark figure. If the rates do, the Commission should give the operator the choice of reducing its rates to comply with the benchmark figure, seeking reconsideration, or initiating a cost-based hearing. Protections for proprietary material must be provided.

As the NPRM suggests, the Commission should enforce its rate determinations by ordering prospective relief, as well as refunds dating back to the date of complaint. Rather than requiring operators to issue refunds to past subscribers, the Commission should allow operators to refund any overcharges by reducing rates or increasing services for existing subscribers. While prompt compliance is expected, a 60 day period will better accommodate established billing cycles.

The suggestion in the NPRM that noncomplying operators be subject to forfeitures should be rejected. Given the uncertainty likely to surround rate regulation for the foreseeable future, forfeitures would be unduly harsh. At least initially, relief should be limited to injunctions and refund orders. Such relief will adequately protect subscribers.

5. Provisions Applicable To Cable Service Generally

a. Geographically Uniform Rate Structure (¶¶111-115)

The 1992 Act states that cable operators shall have a uniform rate structure "throughout the geographic area in which cable service is provided over its cable system." 47 U.S.C. § 543(d). In the NPRM, the Commission focuses on the term "geographic area," and suggests that a rate structure must be uniform among all contiguous communities served by a single headend. The Commission's conclusion is not required by the 1992 Act and is contrary to good public policy.

Section 602(7) of the Act defines a cable system as a "facility . . . within a community" which delivers video programming to multiple subscribers. 47 U.S.C. § 522(7). The Act's uniform rate provision, therefore, requires uniformity only in those areas within each community where cable service is provided. Operators are free to vary rates between different communities. This is consistent with the Act's vesting of basic rate authority in local franchising authorities, who vary from community unit to community unit.

The legislative history confirms a Congressional intent to address only the occasional problem of neighborhood discounting "in different parts of one cable franchise . . . to undercut a competitor temporarily." S. Rep. at 76. The Commission should not impair cable operators' ability to compete by implementing a broader rate uniformity restriction than was intended.

As a practical matter, forcing a cable operator with contiguous franchise areas to standardize rates across the board will produce an adverse economic impact on either the cable system or its customers, or both. The costs associated with serving different franchise areas can vary dramatically for a cable operator. For example, one community might require studios for local access programming, additional local service offices, an Institutional Network for municipal use, and high franchise fees and taxes. Rate uniformity as proposed by the FCC will spread those costs across more frugal cities and dilute political accountability.

In addition, other non-franchise factors may affect the cost of service within a franchise area. For example, one community may have zoning laws that require cable lines to be laid underground, while a contiguous community may allow the operator to attach cable plant to existing utility poles. The density of homes passed in each community served may also vary dramatically. If a uniform rate requirement was broadly imposed on such situations, a cable operator would be faced with two undesireable options: First, cut its rates to the lowest-cost community rate, and not recover its investment for the high-cost communities. Or, have the lower-cost communities, in effect, cross-subsidize the rates of the higher-cost communities so that the cable operator can at least recover its investment. Congress did not intend either result when it enacted Section 623(d).

Requiring a uniform rate structure across communities, as proposed in the NPRM, also would have adverse effects on cable technology. The interconnection of widely diverse communities by fiber or coaxial cable, (and the dismantling of separate headends) has become routine. Such interconnections afford economies of operation; but they will be stunted if every community served by a single headend must have the same rate regardless of local variations in cost, market, and programming offered.

As a practical matter, unless cable operators are afforded the flexibility to establish different rates in different communities, every cable operator facing an overbuilder in only one community will likely be subjected to the classic greenmail scenario: either the operator retains its rate levels (throughout the headend service area) and loses virtually all of the overbuilt community; or, the operator may cut rates in every community to the rate levels offered in the "cream area" selected by the overbuilder, so that the revenue loss dwarfs the price of the greenmail.[21/]

21/ The 1992 Act makes clear that a franchising authority can require an overbuild to build out the entire community, 47

[Footnote cont'd.]

Cable operators should have the same flexibility in meeting competitive differences as the Commission recently granted to local exchange carriers. In order to "expand the LECs' flexibility in responding to competition," the FCC permits LEC rates for "special access" services, which are subject to competition, to differ between zones. Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 F.C.C. Rcd. 7369, 7454-55 (1992).

b. Discrimination (¶¶116-117)

Section 623(e) authorizes, but does not compel, regulatory authorities to prohibit discrimination. Where local authorities do so, cable operators should be allowed to develop bona fide service categories. Different categories of customers warrant different rate levels. This is particularly true for multiple subscriber agreements, including (1) rates charged to seasonal or transient customers (such as the hotel/motel industry); (2) large commercial properties; and (3) long term contracts to serve a multiple dwelling unit ("MDU" -- such as an apartment building) or a planned unit development ("PUD" -- such as a

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[Footnote cont'd.]

U.S.C. § 541(a)(4)(A), but the franchising authority has no basis to require overbuild construction beyond that community.

planned suburban community). Cable operators negotiate these service contracts with commercial businesses, MDU management companies and developers. By their very nature, these sophisticated, often customized commercial situations, differ from the cable operator's relationship with individual subscribers. These commercial agreements often resemble franchise agreements, rather than individual service contracts. A management company or developer routinely seeks price discounts or service enhancements (e.g., a community channel) for its residents. These agents will not accept higher prices from a cable company based on the explanation that the rates are required under federal regulations. They will respond by contracting with an independent SMATV operator or installing a system themselves. Cable operators must be allowed to draw reasonable distinctions in order to operate in the market.

Finally, regardless of which uniform rate/discrimination rules are implemented, an exception must be carved out to grandfather cable operators' existing long term contracts. Without such an exception, cable operators not only would potentially lose a significant source of revenue, as a practical matter, they could also be subject to lawsuits for breach of contract.

c. Negative Option Billing (¶¶118-121, 127)

In recent months, a number of operators have reconfigured their offerings to include a low cost basic service. The introduction has sometimes been met with derisive press reports suggesting an intent to evade Congressional directives. CR&B submits that the launching of "broadcast basic" service is of substantial benefit to the public, consistent with the 1992 Act, and should be encouraged (or at least protected) by FCC rules.

The language and clear thrust of the 1992 Cable Act is to separate the costs of basic service from the costs of tier service. The command in Section 623(b)(7) that cable operators "shall provide" a minimum broadcast basic comes close to requiring the unbundling of tiers from basic.

Although the Act leaves it to an operator's discretion to carry signals other than broadcast and PEG channels on the basic service, its clear preference is for low cost basic and optional tiers. Operators who chose to comply with the Act's preference should be protected from efforts to force cable networks down onto basic. These efforts may be expected from three directions: (1) mistaken application of the "negative option" and "evasion" provisions; (2) efforts by franchising authorities to force certain cable networks to be carried on basic; (3) efforts by programmers to force certain cable networks to be carried on basic.

i. Negative Option/Evasion

Section 623(f) of the 1992 Act restricts "negative option" marketing. It states:

> A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

The restriction was explained on the Senate floor as a reaction to the initial roll-out of a new mini-pay service where existing subscribers were to be billed for the new service if, after a free trial and several notices, they did not reject the service.[22/] In response to that effort, some state enforcement authorities took the position that the cable industry crossed into unfair trade practices with such trial offers. But some of these authorities also challenged the unbundling of tiers, converters and program guides from "basic" if the operator did not automatically downgrade and remarket customers to retain the new options.

An example is the State of Wisconsin, which is currently pressing for a State trade practice regulation requiring an operator to automatically downgrade customers to the lowest level of service if the operator launches such a service.[23/] The

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22/ 138 Cong. Rec. S 567 (Jan. 29, 1992) (Gorton).

23/ In re Trade Practices of Tele-Communications, Inc., Docket 2294 (Wisc. Dept. of Agriculture, Trade & Consumer Protection).

theory is that until an operator launches a low cost basic service, or basic without converter, or basic without guides, one cannot presume that the subscriber paying for expanded service really "affirmatively" wants it. But requiring an operator to automatically downgrade silent customers and remarket them to their present level of service creates three formidable consequences. First, a firestorm of subscriber outrage. No one familiar with the outcry of subscribers after syndex blackouts would force an operator to disconnect virtually all of his subscribers from cable networks and impose the cost of remarketing them all. Second, needless installation of costly traps, while operators await an affirmative subscriber request. Third, such a rule would serve as a powerful disincentive to providing customers a choice of <u>any</u> lower cost service.

Such extreme positions are not consistent with the 1992 Cable Act. The Conference Report emphasizes "this provision is not intended to apply to changes in the mix of programming services that are included in various tiers of cable service." S. Rep. at 65. The Commission should clarify that: (1) maintaining existing subscriptions to "full service," notwithstanding the creation of a lower cost, broadcast-oriented basic is not a negative option, (2) the change or addition of channels to a tier is not a negative option as to current subscribers to those tiers; (3) the change of name of an existing tier is not a negative option; and (4) the "unbundling" of equipment from services, such as allowing subscribers to discontinue payment for an optional converter, is not a negative option to subscribers who fail to turn in their converters.

None of those changes -- changes in the mix of tiers, unbundling among tiers, or unbundling equipment from tiers -- derogates the fundamental goal of negative option restraints. That goal is to protect customers from charges for unsolicited services. In each of the examples, the customers have already ordered the service <u>before</u> new options become available, and they should be presumed satisfied until they elect to vary their service level.

"Revenue neutrality" is an appropriate limitation on most service/equipment changes, if properly applied. If an operator launches a $10 basic service in a system previously offering only $19 "expanded" basic, all customers may be kept as "expanded tier" subscribers if the tier rate is kept at $9, unless and until they elect to downgrade or elect not to pay any future increases in tier rates.

Revenue neutrality should not be required when <u>adding</u> channels to existing services. Otherwise, as the Commission notes, the launch of new services would be paralyzed by the veto of a few customers.

ii. Franchises

The second source of pressure to force cable networks onto basic are franchising authorities. Some pre-1984 franchises required that particular cable networks be carried on basic. Some post-1984 franchises sought to evade the Act's prohibition on programming specifications either by requiring a minimum number of channels on basic or by requiring broad categories of programming to be carried on basic. In each of these cases, operators generally responded by maintaining costly cable networks on basic. Efforts to enforce such clauses defeat the purpose of the 1992 Act to provide low cost basic service. These clauses should be deemed preempted and void.

iii. Affiliation Agreements

The third source of pressure to force cable networks onto basic are the programmers themselves. Several popular programmers offer affiliation agreements in which the operator is charged a penalty for carrying the service on an optional tier. The contract might require an operator to pay a license fee for every basic subscriber, even if the service is only available to tier subscribers. Other affiliation agreements assess a penalty -- say .10 cents per subscriber -- if the service is placed on a tier with less than 90% penetration.

Enforcement of such clauses will frustrate the development of broadcast basic, yet most operators do not have contractual rights to terminate affiliation agreements until a later anniversary. The Commission should declare that its regulations implementing the 1992 Cable Act are force majeure, and permit operators to terminate (and renegotiate) such clauses.

None of these proposals evades rate regulation. Any new low cost basic would need to meet Commission rate benchmarks or otherwise be defensible under FCC rate standards. A decrease in the number of tier channels could be treated as a rate event, triggering a right for dissatisfied subscribers to appeal tier rates to the Commission. But, the flexibility to tier signals is essential to maintaining a low cost basic service.

d. Small System Burdens (¶¶ 128-133)

CR&B supports the Commission's efforts to minimize the regulatory burden imposed on "small system" operators. The Commission's regulatory process hopefully will be relatively simple for all operators to administer, but the need for a streamlined process is particularly important in the case of small systems.

CR&B appreciates the special problems rate regulation poses for small, unaffiliated operators. In some instances, even modest regulatory requirements will strain available resources and personnel, and fuel the need for future rate increases. Contrary to the suggestion in the NPRM, however, these problems do not disappear when a small system is owned by an MSO, even a major MSO. The operator must still consider the regulatory costs faced by each system. If an MSO has a large number of small systems, the aggregate regulatory costs (including the diversion of staff attention from other areas) could be overwhelming. There is simply no basis under the statute for the Commission to distinguish among small systems based on ownership. The Commission must not ignore MSO-affiliated systems in devising an appropraite regulatory strategy for small systems.

CR&B is also troubled by the suggestion in the NPRM that favorable regulatory treatment should be reserved solely for those cases involving small "systems," as opposed to small "franchise areas." If rate regulation were administered on a system-wide basis, the proposed approach would make sense. The approach is illogical, however, where (as is the case here) regulation will ordinarily be administered on a franchise-by-franchise basis. While there may be some economies of scale, a moderate sized system operating under many different franchising agreements faces a very real administrative problem. Again, the Commission's rules should accommodate this problem.[24/]

24/ The Commission might establish different subscriber count cut-offs depending on whether the franchise area involved operates on a stand-alone basis or is part of a larger system. Although the statute requires special treatment in cases involving less than 1,000 subscribers, it can, and should, consider a higher cut-off.

CR&B has three particular suggestions:

° Assuming the Commission adopts a benchmark regulatory approach, it should incorporate a special adjustment to reflect the relatively high "per subscriber" costs faced by "small systems."

° The Commission should also allow operators of small systems and small franchise areas additional latitude to deviate from industry benchmarks. As a practical matter, operators faced with these situations will be unable to engage in even abbreviated cost-based regulatory proceedings to justify comparatively high rates. If additional latitude is provided for these systems, the ill-effects of rate regulation could be reduced.

° Operators should be allowed to bypass individual rate proceedings based on a showing that the pertinent district, subsidiary, or MSO as a whole, has failed to earn undue profits. Once that showing is made, there would be little to gain from dissecting an operator's rates on a franchise-by-franchise basis. Although this approach is essential in the case of small systems and small franchise areas, the Commission should consider making it generally applicable.

e. Reports On Average Prices (¶¶ 136-139)

The NPRM accurately notes that comprehensive annual rate reporting could be extremely burdensome for the Commission and the cable industry. Nonetheless, it would be inadvisable for the Commission to rely on trade publications, which are based on voluntary (incomplete) reporting. The Commission should itself collect data directly from cable operators, but should restrict the breadth of its inquiry and the number of systems involved.

It is not necessary for the Commission to secure data from the entire cable industry to develop a statistically reliable report on cable rates. A modest, random sample (rotating on an annual basis) should provide adequate information on every variety of cable system. The only special effort that might be required would be to include a sufficient number of the relatively few systems curently meeting the statutory definition of "effective competition."

f. Subscriber Bill Itemization (¶175)

Section 622(c) of the Act permits operators to itemize franchise fees, PEG access costs, and other governmental fees on subscribers' bills. Congress' goal here was to promote political accountability. The obvious concern is that subscribers do not appreciate the ramifications of franchise requirements unless they see the costs separately identified on their bill.

The suggestion in the NPRM that the line itemization provision be interpreted consistently with the House Report must be rejected. The House Report provides that operators' costs and fees associated with the franchise may be itemized, but only by "burying" them as part of the grand total of the cable service bill.[25/] But Congress adopted the Senate version of this provision, not the House version. In any event, it is entirely inappropriate to consider any report language on this issue, given the plain language of the statute regarding franchise cost itemization. Section 622(c) presents no ambiguity relating to an operator's ability to itemize. Itemization is clearly understood from comparable billing used by telephone and electric utilities where fees and taxes are added to the underlying service rate.

A statute that is clear and unambiguous on its face need not, indeed cannot, be modified by referring to legislative history. Only statutes that are of doubtful meaning are subject to this interpretive process.[26/]

25/ The House Report considered the example of an operator who collects $30.00 from basic cable subscribers, of which $1.50 represents franchise fees. The Report directed the operator to invoice the subscriber $30.00, not $28.50 plus $1.50. H.R. Rep at 86.

26/ See 2A Norman J. Singer, Sutherland Statutory Construction §45.02 at 5 (5th ed. 1992)(emphasis added); see also ACLU v. FCC, 823 F.2d 1554, 1567 (D.C. Cir. 1987); cert. denied, 485 U.S. 959 (1988) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Obscuring the fees in the "total" bill defeats the very accountability Congress hoped to achieve on the part of local governments. In introducing the Senate Amendment providing for line itemization, Senator Lott called for an "openness in billing" that would identify for subscribers "hidden, unidentified" fees or taxes that the operator must pay and which are often passed on to subscribers.[27/] Senator Lott recounted the cities' history of extracting fees and other payments:

> [L]ook at the history, the record of the cities and municipalities in this area... [I]t is one of the things that led us to the problems we had before 1984. There are many horror stories of how the rates were set, how the franchises were granted. In one instance, ... the applicant had to promise to plant 20,000 trees in order to win the local cable franchise. Do we want that? In several cities ... [they] extracted early upfront payments of several million dollars in anticipated franchise fees from the local cable companies. That is no way to be doing this business. [Id.]

Clearly, burying these identified costs and fees in a "total" defeats the subscriber education benefit Congress intended.

Undue emphasis on the grand total creates practical difficulties as well. For example, many operators provide service over multiple local jurisdictions. Medium and large size systems routinely cross city, county, township and private community boundaries, each with separate franchise fees and distinct

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27/ See 138 Cong. Rec. S569 (1992).

PEG access and other requirements. Marketing the service in the area becomes nearly impossible because operators cannot afford to tailor each advertisement to each community of a system, where individual community sizes may range from less than 100 subscribers to over 10,000. Broadcast "spots" would become lengthy programs and the marketing "pitch" would be completely diluted. Accordingly, for this purpose cable service must be permitted to be advertised as, for example, "$20 plus franchise fees and taxes." Once advertised, the system CSR explaining the service and the subsequent subscriber bill would provide the appropriate pricing schedule for the individual jurisdiction.

Despite the concern expressed in the NPRM, Sections 622(c) and Section 623 are quite compatible. Section 623 establishes that rate regulation must allow full recovery of franchise-imposed costs. Section 622 simply gives the operator the marketing option of setting the costs out on subscriber bills. In fact, the reference in Section 623 to the recovery of costs for "other services required by the franchise," suggests the Commission should add to the list of itemized costs. Apart from PEG access support, an operator's franchise may require provision of an institutional network, specialized municipal video services, and voice and data transmissions. These costs are significant, and may exceed the costs expressly indentified in the statute. Subscribers should be given the opportunity to see what they are paying for.28/

28/ While Section 622 guarantees cable operators certain bill itemization rights, there is nothing barring additional itemization.

g. <u>Effective Date</u> (¶¶142-143)

Sections 623(b)(2) and 623(c)(1)(h) of the 1992 Act require that the Commission prescribe regulations to implement its rate regulation provisions within 180 days of the Act's enactment. The Commission has tentatively concluded that while it is required to adopt implementing rules by April 3, 1993, all implementing steps do not have to be completed by that date. In fact, we suggest an effective date of January 1, 1994. Even then, the Commission should allow greater deviation from the benchmarks during the initial implementation year. This approach is consistent with the FCC's approach for implementing major policy and rule changes for other services. <u>See</u>, <u>e.g.</u>, <u>Transport Rate Structure and Pricing</u>, 71 R.R.2d 517(1992) (adopting a two year interim period).

Prior to the January 1, 1994 effective date, operators should be free to adjust to the new rules, by unbundling and/or reallocating charges. For example, operators who have used remote control revenues and additional outlet revenues to subsidize and maintain low cost basic rates could eliminate the subsidy without delay or penalty.

B. LEASED COMMERCIAL ACCESS

1. Maximum Reasonable Rates (¶¶144-154)

As the Commission suggests in the NPRM, its commercial use regulations must balance competing directives in the Act. The rules should promote competition and diversity, but they must also ensure that leased access rates "will not adversely affect the operation, financial condition, or market development of the cable system." 47 U.S.C. § 532(c)(1).

As a preliminary matter, Commission regulations governing access rates, terms, and conditions should not apply where effective competition exists. The intent of Congress is clear that marketplace forces should be relied upon where a competitive market exists. In such areas, there is no justifiable basis for imposing costly regulatory "solutions".

Where effective competition is not present, regulation of leased access rates is required by statute. Unfortunately, none of the specific rate setting methodologies proposed by the Commission will fulfill the intent of Congress. Because they focus solely on costs, the proposed standards are inconsistent with the FCC's statutory obligation to adopt rules that (1) rely on the marketplace to the extent feasible, and (2) protect the financial condition and market development of cable systems.

The NPRM fails to properly appreciate that the statutory directive is to determine the "maximum reasonable rate" for commerical leased access. The Commission must recognize that if the rates are set too low, the most successful programmers will migrate to leased access channels. This will have an adverse effect on revenue and would frustrate the goals underlying the leased access set aside.29/ To combat this problem, the Commission should set leased access rates for "pay" channels at the highest net fee (based on the prior year's affilation agreement,) collected from any "pay" programmer. Thus, if a system annually nets $10,000 from its most profitable pay channel, it is entitled to collect $10,000 from a leased access user seeking a pay channel.30/

An operator should be under no obligation to place a potential leased access user on either a basic or a tier service level. If the operator agrees to provide such placement, however, the Commission rules must recognize that the leased access channel may not contribute to the tier's overall appeal. To compensate the operator for the "lost" channel, the maximum leased access charge should be set at the tier's average per channel revenue. In other words, the rate would equal the gross revenue

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29/ The NPRM raises this migration issue as a potential problem, but does not seem to take it seriously. NPRM at ¶161. The economics are so clear and compelling, that the issue must be addressed now.

30/ To allow operators to protect their business as technology advances and new service alternatives emerge, it may be necessary to modify this formula to guarantee the operator some additional share of leased access revenue.

for all programmed channels on a particular tier divided by the number of programmed channels on the tier.

With respect to rates for non-profit 501(c)(3) organizations, nothing in the statute authorizes the Commission to establish any special subsidized rate. The 1984 Cable Act's legislative history simply noted that a cable operator may favor select programmers at its discretion, not that a discount is required in any particular case. See H.R. Rep. 98-934 at 51. Any concern that educational or non-profit groups will not have adequate access to cable facilities ignores the ample availability of PEG access and non-commercial must carry rights that already consume valuable channel space with no compensation. If non-profit organizations need access, but do not wish to pay the market based rate, they should use PEG access channels like other noncommercial users.

Similarly, nothing in the 1992 Cable Act authorizes the Commission to require that cable operators provide billing and collection services.[31/] In establishing a rate mechanism for cases where such services are provided by an operator, the Commission should rely upon marketplace forces to the maximum extent possible. As the Commission observed in its NPRM, a competitive

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31/ The legislative history to the 1984 Act specifically stated that such services were not required to be provided. See H.R. Rep. 98-934 at 52.

market already exists for billing and collection services provided by telephone companies. Detariffing of Billing and Collection Services, 102 FCC 2d 1150 (1986), recon. denied, 1 FCC Rcd. 445 (1986). The same is true for billing and collection services provided by cable companies. Where such a marketplace exists, the Commission should rely upon it.

2. Reasonable Terms and Conditions of Use (¶¶155-161)

As previously noted, the Commission, in establishing regulations concerning the terms and conditions of access, must assure that such use "will not adversely affect the operation . . . of the cable system." 47 U.S.C. § 532(c)(1). In the complex environment in which cable companies operate today, with competing demands on channel capacity and location caused by PEG access and must carry requirements, operators must be given flexibility in negotiating terms and conditions with commercial lessees.

Specifically, the 1992 Act does not authorize the Commission to guarantee a commercial lessee a channel on the basic service.[32/] Similarly, tier location, channel position, time scheduling, and access to system addressability should be left to

32/ 47 U.S.C. §543(b)(7). This section specifies the minimum content of basic service, and gives the cable operator discretion whether to add additional programming. See Conf. Rep. at 60.

negotiation between the cable operator and lessee. By statute, commercial use must be for video programming only. 47 U.S.C. § 532(b)(5).

The Commission is not authorized to compel cable companies to make any technical or production facilities available to lessees. A competitive market for such services exists, and the Commission should not involve itself. Commercial lessees must be required by the regulations to deliver a baseband signal to the cable company's headend processors. Again, even for satellite delivered programming, there are many vendors available with whom a lessee can negotiate for downlink services, if the lessee does not wish to purchase its own earth station. There is simply no legitimate reason for the Commission to involve itself in any of these issues.

With respect to the technical quality of leased access programming, cable operators should be permitted to require higher technical quality than what is accepted for PEG channels. Otherwise, operators may be forced to increase technical standards for PEG thereby restricting the retransmission of such programming. Commercial access program technical quality should be comparable to the technical quality of programming provided by the cable operator on the same service tier on which the leased programming is aired. The Commission should be aware that cable operators now receive regular complaints about the technical quality of PEG programming created by third party producers. Cable operators duly respond to these complaints, because of the nature and source of the programming. However, operators should not be burdened further by complaints triggered by substandard commercial programming technical quality.

Cable operators should be given discretion to require advance payment from commercial lessees, or at the operator's discretion, to require some other form of security such as a bond or deposit. It would be inconsistent with the Commission's duty to avoid any adverse financial impact to require cable operators to bear the financial risk of airing leased programming without the posting of suitable security.[33/]

With regard to the treatment of entities affiliated with the cable operator that lease channel capacity, nothing in the 1992 Cable Act changes the 1984 Act's policy allowing favorable rates, terms and conditions for the affiliated entity. The 1992 Act amends Section 612 of the Communications Act, which specifically applies to the designation of channel capacity for commercial use[34/] by "unaffiliated" persons. 47 U.S.C. § 532(b)(2). Moreover, the statute directs any court reviewing an access

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33/ This point is detailed in our Comments in MM Docket 92-258.

34/ The term "commercial use" is defined by the statute as "video programming whether or not for profit." 47 U.S.C. § 532(b)(5).